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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 93-107
DAVID A. RINGER	)	File No. BPH-911230MA
ASF BROADCASTING CORPORATION	)	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.	)	File No. BPH-911230MC
SHELLEE F. DAVIS	)	File No. BPH-911231MA
OHIO RADIO ASSOCIATES, INC.	)	File No. BPH-911231MC

For Construction Permit  
For New FM Radio Station at  
Westerville, Ohio

To: The Review Board

**SUPPLEMENT TO REPLY BRIEF**

Wilburn Industries, Inc. ("Wilburn"), by its attorneys, hereby submits its Supplement to its Reply Brief in the above-referenced proceeding, in view of the fact that counsel for Shellee F. Davis ("Davis") has by telephone informally raised two questions about the factual accuracy of matters stated in Wilburn's Reply Brief. Acceptance of the instant Supplement, which addresses and clarifies those matters, therefore is requested.

**Footnote 4.**

At footnote 4 to its Reply Brief, Wilburn argued that Davis's Exceptions alleged for the first time that a financial issue should have been added against Wilburn below because

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Bernard Wilburn's balance sheet showed that he could not meet his financial commitment to the applicant and that, therefore, the applicant could not meet its costs of construction and operation. Wilburn stated that no party raised this argument below, so that Davis's "exception" must be stricken.

It has been informally pointed out that, at page 5 of her September 16, 1993 "Reply to Opposition to Motion to Enlarge the Issues against Wilburn", Davis did refer to the fact that the liquid assets above liabilities listed on Bernard Wilburn's financial statement did not equal his commitment to the applicant. However, Davis did not at that time argue that a financial issue should be added because Wilburn might not have the funds necessary to meet its estimated costs. Rather, Davis pointed to Bernard Wilburn's financial statement in support of another argument initially advanced in its Motion to Enlarge; viz, that a financial issue should be added because Charles and Bernard Wilburn did not review each other's financial statement before they both executed Wilburn's application.<sup>1</sup> Thus, although Davis did make reference to Bernard Wilburn's financial statement in a reply pleading, that reply, like her initial petition, never

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<sup>1</sup> Accordingly, Wilburn had argued in opposition that the principals of an applicant need not review each other's financial statements if they each execute the application. It did not address, and was given no opportunity to rebut, an allegation that Bernard will not have the liquid assets available to meet his commitment to the applicant. That would have been an entirely different response to an entirely different allegation.

requested a financial issue on the grounds now argued before the Board.<sup>2</sup> Raising that argument for the first time in her Exceptions therefore was improper, as argued in footnote 4 of Wilburn's Reply Brief, and such argument should be stricken.

Footnote 5.

In her Exceptions, Davis contended that Wilburn is not financially qualified because it did not include funding for new equipment and instead relied solely on Carl Fry's letter which, according to Davis, did not provide reasonable assurance that the equipment owned by the former WBBY-FM licensee would be available for lease. In its Reply Brief, at footnote 5, Wilburn alleged that this argument on the part of Davis was "remarkable" because her initial financial certification was premised on Fry's letter.

Davis has informally pointed out, correctly, that Davis was given an identical letter by Fry, but then increased the sums in her initial budget to cover the cost of new equipment if for some reason the WBBY-FM facilities could not be leased. That higher figure was included in her application as initially filed. The

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<sup>2</sup> Had Davis's Reply sought the specification of an issue for new and different reasons not alleged in her initial Motion to Enlarge, that too would have been improper. At the least, Wilburn would have had an opportunity to respond to a reply which was, in effect, a further motion to enlarge issues.

later amendment which increased the level of funding available to her was not submitted for that purpose.

Thus, when questioned at her deposition about her use of the higher figure in her initial application, Davis testified:

I was pretty well certain that BBY would allow me to take over the site and the equipment for the \$6,000 and then me having my operational costs in there. Worst case scenario, that let's say for some reason, in a couple of years, something happens, that in getting the license, BBY doesn't supply all of its equipment and I still need to go on the air, so that's why I just wanted to make funds available just in case I have to go into additional expense.... (Tr. 72.)

She further testified:

[Mid-Ohio is] going to provide me with the use of the studio, the equipment inside, the transmitter site, the antenna that I paid \$6,000 a month for. (Tr. 91.)

She further testified:

Well, I took the monthly that was proposed by Mid=Ohio of \$6,000 being the equipment, the site, the tower and the station .... Then what I did was based on the other information also, I did two scenarios. One is in having the BBY equipment and site ....

\* \* \*

Also as a worst case scenario, like yeah, they said we could have it, reasonably good assurance that we could have it, but also ... in looking at the worst case scenario, I looked at all the other equipment that I would have to have.

\* \* \*

Okay, I looked at okay, let's say if I have to start all over, if by some chance when I receive the license, that WBBY falls through for whatever chance, maybe they die or something, I don't know.... (Tr. 116-118.)

That is, Davis herself believes that the Fry letter provides reasonable assurance that the proposed site and WBBY-FM's existing equipment will be available to her, but nevertheless adopted a higher figure for her budget to cover a "worst case" scenario. Having done so, she now argues before the Board that a disqualifying issue should be added against every other applicant which has relied on the Fry letter because such letter cannot be construed to provide reasonable assurance. The correction of Wilburn footnote 5 therefore does not undercut Wilburn's observation that the arguments in Davis's Exceptions are "remarkable". Less generously, it might be said that such arguments represent legal gamesmanship unrelated to the facts as she herself understands them.

It is respectfully submitted that the instant Supplement will assist the Board's evaluation of this case, by addressing and clarifying matters as to which a question of accuracy has been raised. Consideration thereof is appropriate in these circumstances, and such consideration is respectfully requested.

Respectfully submitted,  
WILBURN INDUSTRIES, INC.

By:

  
Eric S. Kravetz

Dated: January 10, 1994

**CERTIFICATE OF SERVICE**

I, Tracy A. Holden, a secretary in the law firm of Brown, Nietert & Kaufman, Chartered, do hereby certify that on this 10th day of January, 1994, I caused copies of the foregoing "Supplement to Reply Brief" to be delivered by first class mail, postage prepaid, to the person named below:

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